SIAO BEE YEW v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.) March 4, 1966]

[Sibu — Criminal Appeal No. 2 of 1966]

Criminal Law and Procedure — Binding over — Necessity of complying with procedure — Criminal Procedure Code (Sarawak Cap. 58), ss. 70 - 78.

In this case the magistrate issued an order for the appellant to appear before him. When the appellant admitted quarrelling with another person, the magistrate ordered her to execute a bond to keep the peace and be of good behaviour for a period of six months. She appealed.

Held: the proceedings were irregular in this case and the order should be quashed.

Case referred to:—

(1) *Jong Chat* v. *Reg.* [1956] S.C.R. 13.

CRIMINAL APPEAL.

George Seah Kim Seng for the appellant.

Frank Ngui (A.S.P.) for the respondent.

Lee Hun Hoe J.: This is an appeal against the order of the Sibu Police Court dated 6th January, 1966.

Instead of issuing a summons an order was made directing the appellant to appear in the police court. The trial magistrate recorded that the appellant admitted that she was guilty of quarrelling with another person who was not even present in court. Thereupon the trial magistrate ordered appellant to execute a bond to keep the peace and be of good behaviour for a period of six months in her own surety of $50. It is against this order that appellant appealed.

Special procedure for cases of this nature can be found in the Criminal Procedure Code, particularly sections 70 to 78. A perusal of the record of the lower court indicates that the procedure was not complied with. No evidence was recorded by the trial magistrate. How could he bind appellant over unless he was satisfied on evidence that appellant was likely to commit a breach of the peace. I agree entirely with the following passage of the judgment of Bodley J. in *Jong Chat* v. *Regina* [1] at page 14:—

"As the exercise of magisterial powers under section 72 (now section 71) of the Criminal Procedure Code may well result in the interference with the liberty of the subject, these powers must be exercised strictly in accordance with the law."

Although there was no charge against the appellant it would appear she was asked to plead. There is no necessity for framing any charge but a proper inquiry should be held. The record does not show that the nature of the proceeding was explained to appellant.

In my view these irregularities are serious enough to occasion a failure of justice. I allow the appeal and quash the order of the lower court requiring the appellant to execute a bond. I order that the appellant be discharged.

Appeal allowed.

THAM KOK CHEONG & ANOR. v. LOW PUI HENG

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 16, 1966]

[K.L. — Federal Court Civil Appeal No. 97 of 1964]

Partnership — Sale by majority of partners to limited company — Whether binding on minority.

In this case there were four partners carrying on business. Three of the partners purported to sell the partnership business as a going concern to a limited company, formed by them. The fourth partner was not aware of what had taken place, until April 6, 1958, when she was informed by one of the other partners that the partnership business had been converted into a limited company and she no longer had any shares in the partnership business. She therefore commenced an action against the three partners and the limited company. At the trial it was held ([1965] 1 M.L.J. 212) that the acquisition and taking over of the partnership business was void and that the company should account to the plaintiff for her share in the partnership. The first and fourth defendants appealed against this decision.

Held: (1) as the plaintiff had not consented to the sale of the partnership business and was not aware of such sale till April 6, 1958, the purported sale of the business was ineffective and the partnership must be deemed to be in existence till April 6, 1958, when the plaintiff was informed of its dissolution;

(2) there must be a direction for accounts to ascertain the amount due as her share of the partnership to the plaintiff.

Case referred to:—

(1) *Chapple* v. *Cadell* 37 E.R. 953.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

C. H. Smith (*T. K. Sen* with him) for the respondent.

Cur. Adv. Vult.

Tan Ah Tah F.J.: The plaintiff and the first, second and third defendants were partners in a firm which carried on business under the style of King Chong & Co. The fourth defendant is a company formed by the first, second and third defendants for the purpose of acquiring the partnership as a going concern.

The fourth defendant was incorporated on the 25th August 1953. At the first directors' meeting which was held on the 1st November 1953 it was resolved that the company should commence trading as from the 1st January 1954. The first, second and third defendants were the directors who attended this meeting. Three applications for shares, made by the directors themselves, were considered and 299 shares were allotted to each of them "as fully paid shares for a consideration other than cash," such allotment

being "taken as part discharge of the purchase consideration payable by this company for the purchase of" the partnership business. It was further resolved that the company should acquire the partnership business "on the basis of the vendor's balance sheet as at 31st December 1953, and that the purchase shall be completed as soon as the vendor's 31st December 1953 balance sheet becomes available."

The 1953 balance sheet did not become available until 1955 when it was tabled at a directors' meeting which was held on the 27th May 1955. It was resolved at this meeting that the partnership business of King Chong & Co. be taken over retrospectively as from 1st January 1954 on the basis of the said balance sheet. There was a discussion as to the manner in which the partners' loans and deposits appearing in the 1953 balance sheet should be dealt with. The first, second and third defendants thereupon proceeded to allot to each of themselves a further 300 shares to be set off against their loan and deposit account.

The plaintiff, who is the step-mother of the first, second and third defendants, is an illiterate old woman. Her case is that she was unaware of what had been done by her step-sons and that it was not until the "Ching Ming" festival in 1958 which, according to her, was observed on the 6th April 1958, that she was informed by the second defendant that the partnership business had been converted into a limited company and that she no longer had any shares in the partnership business.

After an exchange of letters, the plaintiff, being dissatisfied with the position in which she found herself, commenced this action. The learned trial judge who heard the case by his judgment made orders *inter alia* declaring that the partnership was dissolved on the 1st April 1958, that the acquisition and taking over of the partnership business as a going concern with effect from the 1st January 1954 by the fourth defendant was void and inoperative, that the fourth defendant had the management and control of the business and assets of the partnership as trustee for the plaintiff and the first, second and third defendants and that the fourth defendant by its proper officers should account to the plaintiff for her share in the partnership. By the same judgment various other orders were made, including orders for the taking of accounts. It is against this judgment that this appeal is brought by the first and fourth defendants.

Counsel for the appellants contended that the finding of the learned judge that the partnership was dissolved on the 1st April 1958 is wrong. He said that the learned judge forgot to take into consideration the answers of the first defendant when he was questioned by the judge after his examination-in-chief, cross-examination and re-examination. These answers were to the effect that the first defendant had himself informed the plaintiff before the company was incorporated of his intention to form a limited company to take over the partnership business and that the plaintiff had taken part in various discussions before the company was incorporated. I do not accept the argument that the learned judge completely forgot the answers to questions which were put by himself. The assessment of the credibility of the first defendant as a witness is a matter in which the learned judge had certain advantages which this court does not possess. He was able to see and hear the first defendant giving evidence in the witness-box. It may well be asked why the questions which were put by the learned judge were not put by counsel who appeared in the court below during the first defendant's examination-in-chief. The period of time at which the plaintiff was given notice of the first defendant's intention was a matter of great importance and one would have expected some questions on that point to be put to the first defendant during his examination-in-chief. However that may be, I see no reason to disturb the learned judge's finding of fact that the plaintiff came to know of the first three defendants' intention on the occasion of the "Ching Ming" festival in 1958. Notice of dissolution of the partnership was therefore given to the plaintiff on the 6th April 1958.

It follows from the foregoing that what was done by the first, second and third defendants before the 6th April 1958 including the resolutions passed by them at the directors' meetings in 1953, 1954 and 1955 could have no effect on the plaintiff's share in the partnership. *Chapple* v. *Cadell* [1] is authority for the principle that the majority of the partners in a firm have no power to sell the share of a dissentient minority. It must be remembered in this connection that the partnership was not dissolved until the 6th April 1958 and therefore no question of a sale on dissolution could arise until then. In my opinion, in the circumstances of this particular case, the partnership remained in existence until the plaintiff was informed of its dissolution on the 6th April 1958.

With regard to the position of the first, second and third defendants, their conduct after the 6th April 1958 must, in my view, be held to constitute a ratification of what they did in 1953, 1954 and 1955 when they, acting as directors of the company, purported to acquire the partnership business. They had every right to sell their own shares in the partnership to the fourth defendant. In my judgment, the sale of their own shares to the fourth defendant is a valid sale and the fourth defendant is the

beneficial owner of these shares and is not holding them in trust for any person.

The learned judge considered the defence of laches and acquiescence and came to the conclusion that the defendants were unable to rely on that defence. It will suffice if I say that I agree with his views on this point.

In view of the fact that the plaintiff was not aware of her rights until the 6th April 1958, the defendants cannot rely on the Limitation Ordinance, 1953 as a defence.

In the result the declarations and orders made by the court below are set aside. There will be a declaration that the partnership was dissolved on the 6th April 1958. Then there will be a direction that accounts and inquiries be taken and made which will achieve the following result, that is to say, the ascertainment of the value of the plaintiff's share of the partnership at the date of dissolution, which of course includes the two pieces of land at Klang, and the ascertainment of the value of what should be regarded as her share of the profits of the fourth defendant company from the 1st January 1954 to the 6th April 1958. In arriving at the sum due to the plaintiff, account will have to be taken of the payments made to her from time to time. The plaintiff will be entitled to interest from the 6th April 1958 at the rate of six per centum per annum on the balances outstanding from time to time up to the date the full amount due is paid to her.

Thomson L.P. and **Barakbah C.J. (Malaya)** concurred.

Order accordingly.

Solicitors: *Skrine & Co.; T. K. Sen.*

CHAI SAU YIN v. KOK SENG FATT

[F.C. (Thomson L.P., Pike C.J. (Borneo) and Gill J.) March 16, 1966]

[K.L. — Federal Court Civil Appeal No. 49 of 1966]

Moneylenders — Name of moneylender — Sufficiency of memorandum of loan and authenticated copy — Authenticated copy not exact copy of memorandum — Whether fatal — Moneylenders Ordinance, 1951, ss. 5 & 16.

Construction — Documents — Copy — "True copy" — Authenticated copy.

This was an appeal against the decision of Ong J. who gave judgment in favour of the respondent, a moneylender. The appellant was the registered proprietor of a piece of land in Negri Sembilan and in 1950 he executed a charge of the land in favour of the respondent. In 1962 the respondent commenced proceedings against the appellant but these were discontinued and a new memorandum of loan and charge was executed on August 25, 1964. The relevant documents were prepared by solicitors and it was originally arranged that they should be signed on August 22, 1964. The parties did not come on the appointed day but came instead on the next day and the documents were then signed. The documents had however been prepared on the assumption that they would be signed on August 22, 1964, and the dates had either been left blank or in the case of the memorandum had been shown as August 22. When the documents were signed the solicitor entered the date "23rd August" in every place where the date had been left blank except on the borrower's authenticated copy of the memorandum and the borrower's copy of the agreement; but he omitted to alter the dates which were already shown as August 22 or September 22. Subsequently he found the mistake and with the consent of the solicitors for the appellant, he altered the dates on the copies of the memorandum in his possession. The copies in the possession of the appellant were not however altered. The appellant in his defence alleged (a) that the transaction between himself and the moneylender was unlawful by reason of the name in which the moneylender carried out the transaction in that he did not disclose the names of all the partners of his firm in applying for the licence under the Moneylenders Ordinance; (b) that the memorandum was insufficient because of the mistake made in the dates and because the memorandum did not set out all the terms of the contract of the loan and (c) the authenticated copy did not comply with the requirements of section 16 as it was not an exact copy of the memorandum.

Held: (1) as the respondent in this case had used the name under which he was authorized to carry on the business of moneylending, there was no contravention of any of the provisions of the Moneylenders Ordinance;

(2) the memorandum in this case must be read with the charge and the agreement between the parties and so read it did set out all the terms of the contract of the loan including the previous transactions between the parties;

(3) the alterations made on the memorandum were made simply to remove ambiguities arising from clerical errors and did not in any way alter the sense of the memorandum;

(4) the authenticated copy must be read together with the other documents delivered to the borrower and so read the missing dates were clearly supplied and although the authenticated copy was not an exact copy of the memorandum this was not fatal, as the defects in the copy could be remedied by a consideration of the other documents.

Cases referred to:—

(1) *Chai Sau Yin* v. *Liew Kwee Sam* [1962] M.L.J. 152; [1962] A.C. 302.

(2) *Kasumu* v. *Baba-Egbe* [1956] 3 All E.R. 266; [1956] A.C. 539.

(3) *Edgware Trust Ltd.* v. *Lawrence* [1961] 3 All E.R. 141.

(4) *Abirami Ammal & Anor.* v. *Meyappa Chettiar* [1959] M.L.J. 149.

(5) *Eldridge and Morris* v. *Taylor and wife* 47 T.L.R. 516.

(6) *T. W. Bennet & Co. Ltd.* v. *Smith* 47 T.L.R. 392.

(7) *Sherwood* v. *Decley and wife* 47 T.L.R. 419.

(8) *Quinn* v. *Leathem* [1901] A.C. 495, 506.

(9) *Reading Trust Ltd.* v. *Spero* [1930] 1 K.B. 492.

(10) *Re Hewer* 21 Ch.D. 871.

(11) *Gardner* v. *Shaw* 24 L.T.N.S. 319.

(12) *Sharp* v. *McHenry* 38 Ch.D. 427.

(13) *Thomas* v. *Roberts* [1898] 1 Q.B. 657.

(14) *Coates* v. *Moore* [1903] 2 K.B. 140.

(15) *Burchell* v. *Thompson* [1920] 2 K.B. 80.